

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:2:KMattonen
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release

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to: Laurie Tuzynski
Program Manager, Servicewide Penalties SB/SE

from: Ashton P. Trice
Chief, Branch 2, Procedure & Administration
CC:PA:2

subject: Effect of Section 6651 Failure to Pay Penalty on Withholding

This Chief Counsel Advice responds to your request for assistance received on February 5, 2008 relating to the applicability of section 6651(a)(2) or 6651(a)(3) when there is an overstatement of tax withheld. This advice may not be used or cited as precedent.

ISSUE

When there is no amount shown as tax on the return, but there is an overstatement of tax withheld, does section 6651(a)(2) or section 6651(a)(3) impose a penalty on the overstated amount?

CONCLUSIONS

Under the circumstances described above, there is no failure to pay the amount shown as tax on the return and, therefore, section 6651(a)(2) does not impose an addition to tax. Section 6651(a)(3) does not apply because a downward adjustment to the amount of tax withheld has no effect on the amount of tax that is required to be shown on the return.

FACTS

This advice addresses the situation where a taxpayer's income tax return reports the amount of tax shown as zero and the taxpayer seeks a refund of the amount of tax withheld. The Service refunds the amount claimed. Later, the Service determines the amount withheld was overstated and it assesses the amount that was overstated.

PMTA: 01694

LAW AND ANALYSIS

If a taxpayer files a return, but does not timely pay the amount shown as tax on return, a penalty may be imposed under section 6651(a)(2). If a taxpayer fails to pay a tax that is required to be, but is not, shown on a return within 21 days after the date of the IRS's notice and demand a penalty may be imposed under section 6651(a)(3).

I. Addition to Tax Under Section 6651(a)(2)

Section 6651(a)(2) penalizes a taxpayer who fails to timely pay *the amount shown as tax on any return* specified under section 6651(a)(1), unless the failure is due to reasonable cause and not to willful neglect.

Section 6211 defines a deficiency with reference to the "the amount of tax shown on a return". See I.R.C. 6211(a)(1)(A), 6211(b)(1). We believe the phrase "amount shown as tax on any return", as used in section 6651(a)(2), should be construed in a manner consistent with the use of the same phrase in section 6211. While section 6211 treats some overstated credits as negative tax that affects the amount of tax shown on the return, section 6511(b)(1) expressly states that credits under sections 31 and 33 do not figure into the calculation of the amount of tax shown on the return.

Because these withholding credits are specifically excluded from the deficiency calculation under section 6211(b)(1), they should be treated as payments to the amount shown as tax on the return. Generally, a downward adjustment to a withholding credit is treated as a reduction in the payment of the amount of tax shown on the return, and accordingly, as a failure to pay the amount shown as tax on the return under section 6651(a)(2). The addition to tax under section 6651(a)(2), however, will only apply when a reduction in the amount of the withholding credit reduces the tax paid on the due date to an amount less than the tax shown on the return.

For example, imagine a taxpayer's return reports no tax due and withholding of \$300. The taxpayer was refunded the \$300. Later, the Service makes a downward adjustment of \$300 to the amount withheld. No addition to tax under 6651(a)(2) will apply because the reduction of the amount of the withholding credit to zero does not reduce the amount of tax paid on the payment due date to an amount less than the tax shown on the return. There is no failure to pay the amount shown as tax on the return because that amount is zero and no payment was required.

II. Addition to Tax Under Section 6651(a)(3)

A taxpayer is subject to a penalty under section 6651(a)(3) if the taxpayer fails to pay tax that was required to be, but was not, shown on a return within 21 days after the date the IRS sends notice and demand for payment.

As discussed above, a downward adjustment to a withholding credit does not constitute an adjustment to the amount of tax shown on the return. Section 6651(a)(3), therefore,

does not apply because the amount of tax required to be shown on the return is in fact shown and no adjustment to that tax arises from a reduction in the withholding credit.

Please call Procedure and Administration, Branch 2 at (202) 622-4940 if you have any further questions.